IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1313 OF 2005

Mrs.Hemlata Kamlesh Jain .. Appellant
Versus
Suresh Bhagwandas Bhawsar & Ors. Respondents

Mr. Amol P.Mhatre for appellant

CORAM : P.V.KAKADE, J.

DATE : 25TH OCTOBER, 2005

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by Addl. District Judge, Pune dated 22.3.2005 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division, Pune, dated 7.4.2001 dismissing the suit.

2. I have heard the learned counsel for the appellant. Perused the record.

3. The plaintiff claimed that the property Survey no.1117/4/5/42/A/5 located at Shivajinagar, Pune admeasuring 500 sq. mtrs. having four boundaries owned

and possessed by the plaintiff herself. The defendant nos.1 and 2 played fraud upon the court in Special Civil Suit No.75 of 1985 and thereby by get fraudulent decree against the plaintiff and the same is illegal and not binding on the plaintiff. Hence the plaintiff prayed for declaration as to nullity of decree. In addition to it, plaintiff prayed for a decree of perpetual injunction to restrain the defendant nos.1 and 2 from encroachment of decree passed in Spl. Civil Suit no.75/85. Hence the suit. The defendants challenged the suit, inter alia, denying the allegations on various grounds specifically submitting that no question of fraud was involved and the decree was obtained as per law and hence sought dismissal of the suit.

. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had failed to prove that the decree passed in Spl.Civil Suit No.75/85 was null and void and not binding on the plaintiff. It was further held that the plaintiff failed to prove that the defendant played fraud on the court in the earlier proceeding and obtained decree. Consequently suit was dismissed for want of sufficient evidence. The appeal was carried to the District Court.

The learned Addl. District Judge adjudicated the appeal after hearing both the parties and concurred with the findings recorded by the trial court and dismissed the appeal.

4. At the outset it must be noted that there is absolutely no substantial question of law involved in this appeal. Both the courts below have concurrently held that there is absolutely no evidence on record to show that the element of fraud is to be found while decree was passed in earlier proceeding. The lower appellate court has also recorded that there is no specific pleading nor it is proved by oral as well as documentary evidence to show the element of fraud played by the defendant while obtaining the decree.

. Moreover, it is an evidential aspect that the plaintiff herself had not entered into witness box nor proved the alleged fraud played upon the court by the defendants. The lower appellate court has specifically found that the power of attorney holder of plaintiff has no personal knowledge of the allegations in plaint and he has given evasive replies to the suggestions given to him in the cross examination and has also not proved

fraud or misrepresentation if any. In this regard, it must be noted that the apex court in the recent ruling in the case of **Janaki Vashdeo Bhojwani and anr. vs. Indusind Bank Ltd. and ors**. reported in **AIR 2005 SC 439** has categorically laid down that the power of attorney holder cannot depose in place and instead of principal in respect of the matter which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross examined. If this ratio is to be applied to the present case, it is needless to mention that the plaintiff has no evidence at all to prove the element of fraud. It is also to be noted that the Apex Court, time and again, has come to the conclusion that the concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under Section 100 of C.P.C. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. Under these circumstances, I hold that the concurrent findings recorded by both the courts below are seen to be properly appreciated on the basis of available evidence and therefore, no interference is called for in this appeal. In the result the appeal

stands dismissed with no order as to costs.